IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR

J U D G M E N T

OM PRAKASH VASWANI VS. MUNICIPAL BOARD CHITTORGARH & ORS.

S.B.CIVIL MISC. APPEAL NO.530/ 2006
UNDER ORDER 43 RULE 1(1)C.P.C.
AGAINST THE JUDGMENT AND DECREE DATED 16TH JANUARY 2006 PASSED BY THE ADDIONAL DISTRICT JUDGE NO.1, CHITTORGARH IN CIVIL MISC.CASE NO.71/05 IN CIVIL APPEAL NO.87/04 OMPRFAKASH VERSUS MUNICIPAL BOARD CHITTORGARH.

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REPORTABLE

DATE OF JUDGMENT :- DECEMBER 04,2006

P R E S E N T

HON'BLE MR.JUSTICE PRAKASH TATIA.

Mr.Om Prakash,counsel for the appellant.
Mr.N.M.Lodha & Mr.Anil Bhandari,for Resp.No.1.
Mr.D.S.Rathore,counsel for Respondent No.2 to 5.
Mr.Manish Shishodia,counsel for respondent No.6.

BY THE COURT :-

Heard learned counsel for the parties.

The appellant has challenged the order dated 16th January 2006, passed by the Court of Additional District Judge No.1, Chittorgarh, rejecting appellant's application filed under order 41 rule 19 C.P.C.

Brief facts of the case are that Regular First Appeal No.87/04 was dismissed by the Court below in default vide order dated 19th April 2005. Since that was the Regular First Appeal and the learned Advocate for the appellant was to argue the appeal and the appeal was dismissed due to his absence, learned Advocate of the appellant on the same day i.e. on 19th April 2005 submitted application under Order 41 Rule 19 C.P.C. for restoration and re-admission of the appeal. The said application was signed by the Advocate only and was not supported by any affidavit. The First Appellate Court vide order dated 10th May 2005 dismissed the application on the ground that the application has not been signed by the party nor

affidavit has been filed in support of the application.

Before expiry of period of limitation, another application for restoration of appeal U/O 41 R19 CPC was filed with the signature of the appellant. The appellant also submitted his affidavit along with application dated 19th May 2005. The Second Application submitted under order 41 rule 19 CPC on 19th May 2005 too was dismissed by the First Appellate Court by impugned order dated 16.1.2006 on the ground that earlier application dated 19th April 2005 for the same relief was dismissed by the Court and, therefore, the Second Application cannot be entertained.

The learned counsel appearing for the respondents supported the order on the ground that decision given by the First Appellate Court on earlier application created bar of res judicata against the application dated 19th May 2005 whereas learned

counsel for the appellant submitted that the appellant could not have done anything if he would have been present in the Court on 19th April 2005 as he engaged the Advocate who put in appearance in the Court and his counsel was busy in another Court when the appellant's appeal was called and the First Appellate Court dismissed the appellant's Regular First Appeal in default and that was in fact default of learned advocate. In that situation the learned Advocate himself filed the application for the restoration of the appeal. It is also submitted that principle of res judicata cannot be applied in the facts of the case against entertaining appellant's application under order 41 rule 19 CPC dated 19th May 2005.

I considered the submission of the learned counsel for the parties. It is not in dispute that first application was submitted by the learned counsel for the appellant and it was not signed by the appellant and no affidavit was filed by the counsel or the

appellant in support of application dated 19th April 2005. The order dated 10th May 2005 rejecting application dated 19th April 2005 has not been challenged. If the view taken by the First Appellate Court was right then that application was not treated by the First Appellate Court on behalf of the appellant because one of the ground of rejection of the application by the Court was that it has not been signed by the appellant himself. Meaning thereby application was not treated to be on behalf of the appellant. The decision given on the application which according to the Appellate Court itself was not signed by the appellant and was, therefore, was not application of appellant then the decision given on such application was not decision against the appellant . The appellant in view of of the order of the court below dated 10.5.2005 had no option but to submit another application duly signed by him. The appellant therefore, submitted another application under O 41 R 19 CPC that too within period of limitation. This

subsequent application was dismissed on the ground that appellant's application was dismissed by the Court. If earlier application u/o 41 R 19 CPC was of the appellant than how that application could have been dismissed for want of appellant's signature only ?

This Court constrained to observe that Court below has committed serious error of law in dismissing the earlier application for restoration of appeal filed by the learned counsel on the same day on the ground that it has not been signed by the party. The First Appellate Court ignored this material fact that the Advocate was duly authorised agent of the appellant and was appearing in the appeal to argue the appeal of the appellant. Because of his absence the appeal was dismissed by the Court. Said authorised Agent himself submitted application signed by himself and on that day if the appellant was not present,and therefore, his signature has not been obtained, the application should not have been rejected by the Court

on the ground of want of signature of the appellant on the application. The lower appellate Court's said order dated 10.5.2005 has not been challenged by the appellant and appellant rightly submitted another application for restoration of appeal then the Court below was bound by its own earlier order wherein the Court below found that earlier application was not of appellant. In such situation subsequently filed application of appellant was his first application for restoration of appeal,hence the rejection of subsequent application by the Court below was contrary to its earlier order dated 19.5.2005.

The Court below also observed that affidavit has not been filed in support of the application whereas order 41 rule 19 CPC provides that where appeal is dismissed under rule 11 sub-rule (2) or rule 17, the appellant may apply to the appellate court for re-admission of the appeal. It further provides that where it is proved that appellant was prevented by any

sufficient cause from appearing when the appeal was called on for hearing, the Court shall re-admit the appeal. However, Court may impose cost or may put condition. As per Rule 19 of Order 41 CPC what is required is satisfaction of the Court about the reasons for absence of appellant. The affidavit is one of the mode of proving the fact but when facts are available on the record itself,the Court should not have demand further proof in the form of affidavit. The fact before the First Appellate Court were available of dismissal of the appeal in default by the Court and it goes without saying that default was of learned counsel who did not appear to argue the appeal when the appeal was called for hearing as he was busy in another Court and best person who could have knowledge about the facts and reasons for dismissal of appeal and reason for default was the learned counsel himself. Learned counsel himself submitted application signed by himself. Therefore, the Court instead of finding out whether there was sufficient cause for absence of learned

advocate at the relevant time from the facts available on record, on irrelevant considerations rejected the application submitted by the learned counsel for restoration of appeal. It is different thing that Court had full power to dismiss the application for restoration of the appeal on merits for very many reasons but there was no reason for First Appellate Court to dismiss the application when the authorised agent of the appellant himself submitted application and was best person to disclose reason for his absence. The learned advocate of appellant signed the application containing the reason as for his absence. Normally in that situation the Court should have avoided demanding affidavit of advocate and should not have rejected the application on this ground.

Technicalities of law should be avoided so that the justice can be done. The technicalities of law and particularity procedural law should not be used to multiply the proceedings in the Courts and to put

burden of unnecessary expenses upon the parties. Herein in this case to oppose appeal, not only appellant had to engage Advocate for preferring appeal in the High Court but in view of number of respondents, three learned counsel have put in appearance on behalf respondents.

In any case earlier order as it was passed cannot come in the way of the appellant's application dated 19th May 2005 which was filed within period of limitation and from the facts it appears that appellant took every care to prosecute his appeal and the Appellant engaged counsel and counsel was vigilant to take steps in time before the First Appellate Court and therefore, it cannot be said that it was a case of appellant's negligence in conducting appeal. The learned take steps in time for restoration of appeal therefore, appellant cannot be denied opportunity of hearing by the Court in his appeal to challenge the decree of the Court below.

In view of above, the appeal of the appellant is allowed. Order dated 16th January 2006 is set aside. The application of the appellant for restoration of the appeal is allowed. The Appellate Court shall decide the appeal on merits.

Both the parties are directed to appear before the First Appellate Court on 22nd December 2006.

(PRAKASH TATIA)J.

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